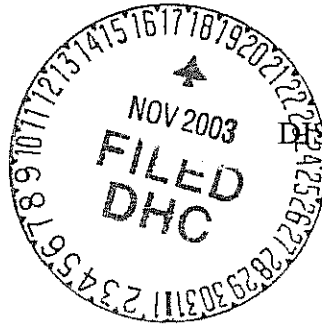


NORTH CAROLINA
WAKE COUNTY



BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR
03 DHC 16

THE NORTH CAROLINA STATE BAR,)
Plaintiff)

v.)

WILLIE D. GILBERT II, Attorney,)
Defendant)

MOTION TO DISMISS,
MOTION FOR SANCTIONS,
ANSWER TO THE COMPLAINT
AND
COUNTERCLAIMS

NOW COMES Willie D. Gilbert, II, by and through undersigned counsel, and for his Answer and other responses to the allegations of the Complaint in this action, hereby alleges and says as follows:

FIRST DEFENSE AND MOTION TO DISMISS

Defendant moves to dismiss this action pursuant to **Rule 12(b)(1)** of the North Carolina Rules of Civil Procedure on the ground that the North Carolina State Bar lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE AND MOTION TO DISMISS

Defendant moves to dismiss this action pursuant to **Rule 12(b)(2)** of the North Carolina Rules of Civil Procedure on the ground that the North Carolina State Bar lacks jurisdiction over the person of the Defendant.

THIRD DEFENSE AND MOTION TO DISMISS

Defendant moves to dismiss this action pursuant to **Rule 12(b)(3)** of the North Carolina Rules of Civil Procedure on the ground that the North Carolina State Bar has been improperly and unconstitutionally designated and/or constituted as a court/adjudicatory body of the State of North Carolina.

FOURTH DEFENSE AND MOTION TO DISMISS

Defendant moves to dismiss this action pursuant to **Rule 12(b)(6)** of the North Carolina Rules of Civil Procedure on the ground that the complaint fails to state a claim upon which relief can be granted.

FIFTH DEFENSE AND MOTION TO DISMISS

Defendant moves to dismiss this action on the grounds of **illegality**.

SIXTH DEFENSE AND MOTION TO DISMISS

This action is barred by the **statute of limitations**. Therefore, as an additional ground for dismissing this action, the Defendant expressly pleads the expiration of the statute of limitations in defense and in bar of the Plaintiff's Complaint.

SEVENTH DEFENSE AND MOTION TO DISMISS

This action is barred by the **statute of limitations**, and, therefore, as an additional ground for dismissing this action, the Defendant expressly pleads the expiration of the statute of limitations in defense and in bar of the Plaintiff's Complaint.

EIGHTH DEFENSE AND MOTION TO DISMISS

This action is barred by the doctrines of **res judicata and/or collateral estoppel**, and, therefore, as additional grounds for dismissing this action, the Defendant expressly pleads the same in defense and in bar of the Plaintiff's Complaint.

NINTH DEFENSE AND MOTION TO DISMISS

This action is barred by the doctrines of **estoppel and/or equitable estoppel**, and, therefore, as additional grounds for dismissing this action, the Defendant expressly pleads the same in defense and in bar of the Plaintiff's Complaint.

TENTH DEFENSE AND MOTION TO DISMISS

This action is barred by the doctrine of **laches**, and, therefore, as an additional ground for dismissing this action, the Defendant expressly pleads the same in defense and in bar of the Plaintiff's Complaint.

ELEVENTH DEFENSE AND MOTION TO DISMISS

This action is barred by the doctrine of **waiver**, and, therefore, as an additional ground for dismissing this action, the Defendant expressly pleads the same in defense and in bar of the Plaintiff's Complaint.

TWELFTH DEFENSE AND MOTION TO DISMISS

In bad faith -- and apparently motivated by a vindictive animus against the Defendant for having exercised his clearly established and lawful right to defend himself zealously against (1) charges of professional misconduct brought by the North Carolina State Bar in North Carolina State Bar v. Gilbert, 00 DHC 3 ("Gilbert I", filed on February 15, 2000), and (2) an unjustified civil suit filed by the Plaintiff in Wake County District Court to recoup from the Defendant money that it willfully paid to a third party without lawful authority and in direct contravention of the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar (North Carolina State Bar v. Gilbert, 02 CVD 4961, "Gilbert II") -- the Plaintiff now brings an action ("Gilbert III") alleging that the Defendant engaged in professional misconduct with respect to three former clients who have not been wronged or suffered any harm, who have never to Defendant's knowledge filed complaints or grievances about the Defendant's conduct, whose alleged mishandling by the Defendant could have been addressed in Gilbert I, and with two of whom the Defendant last had professional dealings for **more than 6 years** prior to the filing of the instant complaint.

When viewed in light of Plaintiff's prior actions and conduct, as well as standing alone, this latest action by the Plaintiff betrays an unrestrained and excessive desire to punish the Defendant by destroying his professional reputation and ability to earn a living, by requiring him to repeatedly incur unnecessary legal expenses, and by otherwise inflicting vindictive financial and emotional hardships upon the Defendant. As such, the instant action constitutes a **vindictive prosecution** in violation of the United States and North Carolina Constitutions. Therefore, as an additional ground for dismissing this action, the Defendant expressly pleads the existence of such unconstitutional conduct in defense and in bar of the Plaintiff's Complaint.

THIRTEENTH DEFENSE AND MOTION FOR RULE 11 SANCTIONS

For at least 4 years prior to filing the Complaint in this action, the Plaintiff and its investigators have been in possession of, and thoroughly familiar with, the facts and circumstances allegedly supporting the instant action. Moreover, in bad faith -- and apparently motivated by a vindictive animus against the Defendant for having exercised his clearly established and lawful right to defend himself zealously against (1) charges of professional misconduct brought by the North Carolina State Bar in North Carolina State Bar v. Gilbert, 00 DHC 3 ("Gilbert I", filed on February 15, 2000), and (2) an unjustified civil suit filed by the Plaintiff in Wake County District Court to recoup from the Defendant money that it willfully paid to a third party without lawful authority and in direct contravention of the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar (North Carolina State Bar v. Gilbert, 02 CVD 4961, "Gilbert II") -- the Plaintiff now brings an action ("Gilbert III") alleging that the Defendant engaged in professional misconduct with respect to three former clients who have not been wronged or suffered any harm, who have never to Defendant's knowledge filed complaints or grievances about the Defendant's conduct, whose alleged mishandling by the Defendant could have been addressed in Gilbert I, and with two of whom the Defendant last had professional dealings for **more than 6 years** prior to the filing of the instant complaint.

When viewed in light of Plaintiff's prior actions and conduct, as well as standing alone, this latest action by the Plaintiff betrays an unrestrained and excessive desire to punish the Defendant by destroying his professional reputation and ability to earn a living, by requiring him to repeatedly incur unnecessary legal expenses, and by otherwise inflicting vindictive financial and emotional hardships upon the Defendant.

The filing of the Complaint under these and other circumstances herein alleged is a direct **violation of Rule 11** of the North Carolina Rules of Civil Procedure, and the Defendant respectfully urges the Court to impose an appropriate sanction against the Plaintiff and/or its counsel, including, but not limited to (1) an Order dismissing this action with prejudice, and (2) an Order compelling the Plaintiff to pay reasonable attorney's fees incurred by the Defendant in responding to and addressing all of the issues raised by the Complaint and the Answer in this action.

FOURTEENTH DEFENSE
AND
ANSWER TO THE COMPLAINT

As a further Answer and defense to the Complaint in this action, and in direct response to the numbered allegations of such Complaint, the Defendant hereby alleges and says as follows:

1. It is denied that the North Carolina State Bar is a body duly organized under the laws of North Carolina and that the North Carolina State Bar is the proper party to bring this proceeding.

2. It is admitted that the Defendant was admitted by the Courts of North Carolina to practice law before them, and that at all relevant times the Defendant followed the laws of the State of North Carolina. The remaining allegations of Paragraph 2 of the Complaint are denied.

3. The allegations of Paragraph 3 of the Complaint are admitted.

4. It is admitted that the Defendant represented a Necole Maxwell, and pursued a claim on her behalf resulting from an automobile accident. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4 of the Complaint, and the same are, therefore, denied.

5. Upon information and belief, it is admitted that Ms. Maxwell settled her personal injury claim for \$4,500.00. However, the Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the remaining allegations of Paragraph 4 of the Complaint, and the same are, therefore, denied.

6. The allegations of Paragraph 6 of the Complaint are admitted.

7. It is admitted that the Defendant prepared three trust account checks for \$1,500.00 each. However, it is specifically denied that these checks were prepared on September 8, 1997.

8. It is denied that the Defendant did not pay \$1,500.00 to Dr. Comis.

9. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint, and the same are, therefore, denied.

10. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the allegations of Paragraph 10 of the Complaint, and the same are, therefore, denied.

11. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the allegations of Paragraph 11 of the Complaint, and the same are, therefore, denied.

12. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the allegations of Paragraph 12 of the Complaint, and the same are, therefore, denied.

13. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the allegations of Paragraph 13 of the Complaint, and the same are, therefore, denied.

14. The Defendant is currently without knowledge or information that is sufficient to form a belief as to the truth of the allegations of Paragraph 14 of the Complaint, and the same are, therefore, denied.

15. The allegations of Paragraph 15 of the Complaint, including all of its subparts, are denied.

As to any and all remaining allegations that may be deemed to have been included in the Complaint, the same are hereby denied.

COUNTERCLAIM

As a further response to the Complaint in this action, Defendant Willie D. Gilbert, II, complaining of the Plaintiff in this action, hereby alleges, says and counterclaims as follows:

16. The allegations and defenses contained in the preceding portions of this pleading are re-alleged and incorporated by reference.

17. The instant lawsuit is inextricably connected to allegations of professional misconduct originally leveled by the Plaintiff in July of 1999, and later heard by the Disciplinary Hearing Commission of the North Carolina State Bar between the months of July and September of 2000, in what ultimately came to be known as North Carolina State Bar v. Gilbert, No. 00 DHC 3 before the Disciplinary Hearing Commission of the North Carolina State Bar ("Gilbert I").

18. On July 13, 1999, and prior to the filing of a formal complaint in Gilbert I, the Plaintiff served the Defendant with: (a) a "grievance" alleging that the Defendant had engaged in professional misconduct with respect to a former client, and (b) a Subpoena for the Defendant's trust and operating account records "from Jan. 1, 1998 to the present". Although the Defendant could have contested the legality of the Subpoena because it did not, as required by Rule 27 NCAC 1 .0128(a) of the Rules and Regulations of the North Carolina State Bar, allege misconduct "in the handling of client funds", he nevertheless elected to honor the Subpoena and signed a release granting the Plaintiff unrestricted access to his trust and operating account records.

19. Also in July of 1999, and at the request of the Plaintiff, the Defendant consented (by way of a Consent Order) to having his entire trust account, including his own access thereto, completely frozen. In fact, since the Consent Order freezing the Defendant's trust account has never been dissolved, the reality is that since July of 1999, there has been no activity in the Defendant's trust account, there has been no change in the records that reflect the transactions involving the Defendant's trust account, and the Plaintiff has been in possession of the information which it contends supports the instant Complaint.

20. Notwithstanding the foregoing, on February 15, 2000, the Plaintiff filed a Complaint with the Disciplinary Hearing Commission of the North Carolina State Bar (Gilbert I) alleging, in pertinent part, that in 1998 and 1999 the Defendant had "misappropriate[ed]" the trust account funds of at least four different clients -- Celeste Pologruto, Michelle and Sanjay Munavalli, and one or more unnamed "clients".

21. Later, on April 26, 2000, and without the Defendant having the opportunity to be heard, the Plaintiff sought and obtained an Order allowing it to amend the original complaint in Gilbert I. In its Amended Complaint, the Plaintiff, among other things, abruptly dropped its original allegation that the Defendant had misappropriated money from the Munavallis, and substituted therefor two entirely new and substantively different allegations. Significantly, neither the original Complaint, nor the Amended Complaint in Gilbert I alleged that the Defendant had taken any other steps that constituted a mishandling or misappropriation of client funds in 1998.

22. At no time prior to the February 15, 2000 filing of the Complaint in Gilbert I did the Plaintiff notify or give the Defendant an opportunity to respond to any claim or charge that there was some question about his conduct during his representation of the Munavallis. Nor, upon information and belief, did the Munavallis at any time prior to the filing of the Complaint in Gilbert I lodge a complaint with or otherwise notify the North Carolina State Bar or the Defendant that they had any lingering concerns about the Defendant's conduct or quality of representation. Instead, upon information and belief, none of the allegations of alleging misconduct regarding Michelle and Sanjay Munavalli in Gilbert I has ever been reviewed, heard or passed upon by a panel of the Grievance Committee of the North Carolina State Bar.

23. In fact, on or about May 23, 1998, nearly two years prior to the filing of the Complaint in Gilbert I, the Defendant and the Munavallis entered into an agreement that resolved

all issues between them, including but not limited all issues concerning the amount of fees and expenses that the Defendant would be paid for his services.

24. Notwithstanding the foregoing, and upon information and belief, prior to July 17, 2000, which was the first day of the disciplinary hearing in Gilbert I, the Plaintiff -- with full knowledge that a valid claim for reimbursement from the North Carolina State Bar Client Security Fund ("Client Security Fund") requires a showing of financial loss as a result of "dishonest conduct" on the part of an attorney, that the issue of honesty/dishonesty was directly before the DHC as a result of the Plaintiff's own Amended Complaint, and especially that no determination of fraud, dishonesty or any other misconduct on the part of the Defendant had yet been made by the DHC -- urged or otherwise encouraged Michelle Munavalli, who had not previously made a complaint or grievance about the Defendant's fees and expenses, to file an application with the Client Security Fund for reimbursement of all the attorney's fees and expenses she had paid the Defendant.

After four days of hearings in Gilbert I, however, no determination of fraudulent or dishonest conduct in connection with the Defendant's dealings with the Munavallis was ever made by the DHC.

25. On or about November 1, 2000, the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") entered an Order of Discipline in Gilbert I which concluded that the Defendant had violated certain provisions of the Revised Rules of Professional Conduct, and which, in contravention of the Plaintiff's request for an Order of disbarment, suspended the Defendant from the practice of law for five years, with the last three years of such suspension being stayed on certain conditions.

26. Although one of the conditions that were imposed by the DHC as a prerequisite to the Defendant's reinstatement to the practice of law was a requirement that the Defendant reimburse the Client Security Fund for any amounts disbursed "as a result of [the Defendant's] misconduct," it is presumed that the DHC did not intend to require the Defendant to reimburse the Client Security Fund for any amount(s) that it may have paid to a third party wrongfully or without lawful authority.

27. On December 4, 2000, the Defendant filed a Notice of Appeal from the DHC's Order of Discipline in Gilbert I. As part of the appellate process, and as permitted by Rule 23 of the Rules of Civil Procedure, the Defendant sought and obtained, first from the North Carolina Court of Appeals, and then from the North Carolina Supreme Court, two consecutive writs of supersedeas partially staying the enforcement of the DHC's Order of Discipline.

Because the terms of the writs of supersedeas prohibited the Defendant from accepting any new clients and from handling or otherwise dealing with client/fiduciary funds, the practical effect of these writs was simply to extend, for the benefit of those who were among the Defendant's existing clients as of November 1, 2000, the time for the Defendant to wind down his practice as to those particular clients. Otherwise and consequently, the Defendant has been deprived of the ability to practice law in the customary sense, and to earn a livelihood in his

chosen profession since before September 19, 2000 (the last day of the disciplinary hearing in Gilbert I).

28. Nevertheless, in direct response to the issuance of at least one of these writs, the Plaintiff advised counsel for Defendant that it was the Plaintiff's intent to deal with the Defendant in such a manner as to discourage similarly situated attorneys from exercising their appellate rights by seeking and obtaining as part of the appellate process Orders staying or otherwise impacting the full enforcement of adverse Orders of Discipline secured by the Plaintiff and entered by the DHC.

29. On or about January 18, 2001, and in spite of the fact that the DHC had concluded in Gilbert I that the Defendant had not engaged in any fraudulent, deceitful or dishonest conduct with respect to Michelle and Sanjay Munavalli, the North Carolina State Bar Client Security Fund, a political arm of the Plaintiff North Carolina State Bar, paid Michelle Munavalli more than \$4,600.00 following her testimony in Gilbert I. This payment was made without lawful authority and in direct contravention of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar, which require that an applicant receiving Client Security Funds be the victim of, and have suffered financial loss as a result of, "dishonest" conduct.

30. On or about April 16, 2002, the Plaintiff filed a civil action against the Defendant in Wake County (N.C.) District Court. That action, which is captioned as North Carolina State Bar v. Gilbert, 02 CVD 4961 (hereinafter "Gilbert II") and is still pending, seeks to compel the Defendant, purportedly under the doctrine of subrogation, to pay the Plaintiff, in addition to other sums, the \$4,600.00+ that it paid to Michelle Munavalli in direct contravention of the Rules Governing the Administration of the Client Security Fund.

31. Under the doctrine of subrogation, the North Carolina State Bar has no greater right to recover from the Defendant than do the Munvallis, and it is subject to the same claims and defenses that would apply to the Munavallis. Therefore, since Gilbert II was filed some 3 years and 330 days after the occurrence of the acts that allegedly supported its filing, it was clearly barred the applicable 3-year statute of limitations at the time it was filed. Among several other defenses, it was also clearly barred by the doctrines of accord and satisfaction, res judicata, judicial estoppel and equitable estoppel.

32. On July 16, 2002, a divided panel of the North Carolina Court of Appeals affirmed the November 1, 2000 Order of Discipline entered by the DHC in Gilbert I.

33. On August 20, 2002, the Defendant appealed the North Carolina Court of Appeals' decision in Gilbert I to the North Carolina Supreme Court as a matter or right.

34. On September 10, 2003, the North Carolina Supreme Court held oral arguments in Gilbert I.

35. Two days later, on September 12, 2003, the Plaintiff filed the instant action before the Disciplinary Hearing Commission of the North Carolina State Bar ("Gilbert III").

36. Curiously, the instant action was apparently precipitated by a “grievance” that had been filed against the Defendant more than three years ago -- on July 17, 2000. By implication of its own terms, this grievance was based upon information known to the Plaintiff prior to the first day of the hearing in Gilbert I. And, as with all previous complaints and grievances filed against the Defendant except for perhaps one, the July 17, 2000 grievance was filed not by one of the Defendant’s clients, but by, and in the name of, “the North Carolina State Bar”.

37. For reasons which may well be explained by the Plaintiff’s stated vindictive animus, the “grievance” giving rise to the instant action contained the knowingly false allegations that: (a) the Defendant “never presented [Necole] Maxwell with a disbursement statement . . .”; and (b) “[Necole] Maxwell received . . . less than \$500.00[]” from her settlement. These allegations were false when they were made, and whoever made them (presumably one or more persons affiliated with the Plaintiff) knew they were false when they were made.

38. To the extent that the July 17, 2000 grievance which preceded the filing of this action served as a basis for the Grievance Committee’s decision to authorize the filing of this action, this action has been precipitated by the propagation of intentional misrepresentations of fact, and is, therefore, unconstitutional and void ab initio.

39. Upon information and belief, the instant lawsuit represents the latest in a series of sharp practices intended by the Plaintiff to impair irreparably, without justification, the Defendant’s professional reputation, to punish him and to exact from him a price for having escaped the disciplinary punishment sought by the Plaintiff, and for having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff’s incessant efforts to mount legal attacks that the Defendant’s own clients have not mounted.

40. The series of sharp practices herein complained of include, but are not limited to, the following:

(a) Circumventing the legally requisite procedure for instituting attorney disciplinary proceedings by filing with the Disciplinary Hearing Commission of the North Carolina State Bar a Complaint alleging attorney misconduct with respect to Michelle and Sanjay Munavalli when neither the client, nor any other person or organization (including the Plaintiff) had validly preceded such Complaint with the filing of a grievance or any other complaint about the Defendant's conduct;

(b) Circumventing the legally requisite procedure for instituting attorney disciplinary proceedings by filing with the Disciplinary Hearing Commission of the North Carolina State Bar, but without the required authorization of a duly constituted panel of the Grievance Committee of the North Carolina State Bar, a Complaint alleging misconduct in connection with the Defendant’s representation of Michelle and Sanjay Munavalli;

(c) Filing a grievance against and issuing a subpoena for the trust account records of an attorney-defense witness who, within a few days, was expected to provide corroborating testimony on behalf of the defendant in Gilbert I. Shortly after receiving the grievance and subpoena from the Plaintiff, the defense-witness became unavailable to testify;

(d) Attempting to impeach the credibility of another defense witness in Gilbert I by suggesting that the witness had been convicted of crimes of which the Plaintiff knew the witness had not been convicted;

(e) Engaging in an immediate campaign to publish and publicly distribute a notice that the North Carolina State Bar Client Security Fund, whose express purpose is "to reimburse . . . clients who have suffered financial loss as the result of dishonest conduct of lawyers . . . [,]" has awarded \$4,627.43 to Michelle Munavalli, knowing that the Defendant had not embezzled any money from or otherwise practiced any fraud or deceit upon the Munavallis, and knowing that awarding the Munavallis \$4,627.43 was unwarranted and unlawful under the Rules Governing the Administration of the Client Security Fund.

(f) Attempting to recoup from the Defendant in a civil action monies that the Plaintiff knowingly paid to Michelle Munavalli without lawful authority and in direct contravention of the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar.

(g) Knowingly making material misrepresentations of fact during oral arguments before the North Carolina Supreme Court in Gilbert I, including, but by no means limited to, the knowing misrepresentation that the Defendant "stole \$45,000.00" from one of his clients.

(h) Indicating that the Plaintiff's intent is to deal with the Defendant in such a manner as to discourage similarly situated attorneys from seeking and obtaining as part of the appellate process, as the Defendant has sought and obtained from both the North Carolina Court of Appeals and the North Carolina Supreme Court in this case, Orders staying the enforcement of adverse Orders of Discipline secured by the Plaintiff and entered by the DHC.

(i) Asserting in its brief to the North Carolina Supreme Court in Gilbert I that it was "not clear that a genuine controversy exist[ed] as to th[e] issue[]" of whether and to what extent the Defendant was entitled to have the active period of his suspension reduced/credited, for purposes of reinstatement, by the amount of time that the Defendant has been unable to practice law as a result of the proceedings in Gilbert I, when: (i) nearly a year earlier the Plaintiff had already indicated that it was going to contest the Defendant's right to a credit for "time served", and (ii) within 5 days of the issuance of the Supreme Court's per curiam decision in Gilbert I, counsel for the Plaintiff unilaterally announced the Plaintiff's intention to treat the Defendant's suspension as becoming effective on October 23, 2003, and, by implication, to require the Defendant to serve an

additional two-year period of time during which he would be unable to engage in the practice of law. As counsel for the Plaintiff previously indicated, the intent behind the Plaintiff's approach is to discourage other lawyers from fully exercising their appellate rights.

(j) Filing a grievance in connection with the instant action that contains knowingly false and material misrepresentations of fact.

(k) Securing an authorization to file this action with full knowledge that the grievance which precipitated the filing of this action contains intentional misrepresentations of fact.

(l) Filing the instant action more than three years after the filing of the grievance that precipitated this action.

(m) Filing the instant action with respect to three former clients of the Defendant who have not been wronged or suffered any harm, who have never to Defendant's knowledge filed complaints or grievances about the Defendant's conduct, whose alleged mishandling by the Defendant could have been addressed in Gilbert I, and with whom the Defendant last had professional dealings more than 5 years, and in two cases six years, prior to the filing of the instant complaint.

41. Upon information and belief, the instant action is part and parcel of a continuing effort on the part of the Plaintiff to menace and intimidate the Defendant, to unnecessarily and unjustifiably erect obstacles to the Defendant's ability to rebuild and move forward in his professional career, and to retaliate against the Defendant for his having exercised his clearly established and lawful right to defend himself zealously against repeated claims and charges of professional misconduct brought by the North Carolina State Bar and for having sought appellate relief from an adverse Order of Discipline secured by the Plaintiff and entered by the DHC.

COUNT I

(Vindictive Prosecution/Enforcement in Violation of Article I of the N.C. Constitution)

42. The allegations of Paragraphs 1 through 41 of this responsive pleading are re-alleged and incorporated by reference.

43. The Due Process and Equal Protection Clauses of the United States Constitution, with which Article I of the North Carolina Constitution is co-extensive, prohibit the vindictive enforcement and/or prosecution of state laws.

44. By attempting through this action to secure a disciplinary sanction in connection with the Defendant's professional dealings with three former clients who have not complained or otherwise suffered any harm or loss, and by doing so in apparent bad faith and as part of a continuing effort to menace and intimidate the Defendant, and to exact a price for the Defendant's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff's sharp practices and incessant efforts to

mount legal attacks that the Defendant's own clients have not mounted, the Plaintiff has engaged, and is continuing to engage, in a **vindictive prosecution** of the Defendant in violation of the United States and North Carolina constitutions.

45. As a direct and proximate result of the Plaintiff's conduct in this regard, the Defendant has sustained financial, professional and emotional damage, and is entitled to have this action dismissed and to recover the costs, expenses and attorneys fees that he has incurred in defending this action.

46. Furthermore, since the instant action is part of a continuing effort to exact a price for the Defendant's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff's repeated legal assaults, since the Plaintiff secured the Grievance Committee's authorization to file this action with full knowledge that the Grievance Committee was relying on a grievance that the Plaintiff knew contained material and intentional misrepresentations of fact, and since the grievance giving rise to this action was based upon information and clients known to the Plaintiff prior to July 17, 2000 (the first day of the hearing in Gilbert I), the Defendant is also entitled to a judgment:

- a) Declaring the filing of this action to be the result of a vindictive prosecution;
- b) Declaring the filing of this action to be the result of the perpetration of a fraud upon the Grievance Committee of the North Carolina State Bar;
- c) Declaring the filing of this action to be unconstitutional, and without justification or lawful authority;
- d) Enjoining the Plaintiff from attempting to re-litigate any of the claims asserted in the Complaint in this action; and
- e) Enjoining the Plaintiff from attempting in the future to litigate any claims relating to the Defendant's relations with his clients that may have accrued on any date prior to the date that the Defendant is reinstated to the practice of law.

COUNT II

(Deprivation of Procedural Due Process in Violation of Article I of the N.C. Constitution)

47. The allegations of Paragraphs 1 through 46 of this responsive pleading are re-alleged and incorporated by reference.

48. The Due Process Clause of the United States Constitution, with which Article I of the North Carolina Constitution is co-extensive, requires the government to abide by certain procedural rules so that it deliberates carefully and gives individuals, such as the Defendant, an effect right and opportunity to contest governmental action affecting a protected interest.

49. By attempting through this action to secure a disciplinary sanction in connection with the Defendant's professional dealings with three former clients who have not complained or otherwise suffered any harm or loss, and by doing so on the basis of intentional misrepresentations of fact, in apparent bad faith, and as part of a continuing effort to menace and intimidate the Defendant, and to exact a price for the Defendant's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff's sharp practices and incessant efforts to mount legal attacks that the Defendant's own clients have not mounted, the Plaintiff has deprived the Defendant of his right to procedural due process.

50. As a direct and proximate result of the Plaintiff's conduct in this regard, the Defendant has sustained financial, professional and emotional damage, and is entitled to have this action dismissed and to recover the costs, expenses and attorneys fees that he has incurred in defending this action.

51. Furthermore, since the instant action is part of a continuing effort to exact a price for the Defendant's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff's repeated legal assaults, since the Plaintiff secured the Grievance Committee's authorization to file this action with full knowledge that the Grievance Committee was relying on a grievance that the Plaintiff knew contained material and intentional misrepresentations of fact, and since the grievance giving rise to this action was based upon information and clients known to the Plaintiff prior to July 17, 2000 (the first day of the hearing in Gilbert I), the Defendant is also entitled to a judgment:

- a) Declaring the filing of this action to be the result of a deprivation of procedural due process;
- b) Declaring the filing of this action to be the result of the perpetration of a fraud upon the Grievance Committee of the North Carolina State Bar;
- c) Declaring the filing of this action to be unconstitutional, and without justification or lawful authority;
- d) Enjoining the Plaintiff from attempting to re-litigate any of the claims asserted in the Complaint in this action; and
- e) Enjoining the Plaintiff from attempting in the future to litigate any claims relating to the Defendant's relations with his clients that may have accrued on any date prior to the date that the Defendant is reinstated to the practice of law.

COUNT III

(Deprivation of Substantive Due Process in Violation of Article I of the N.C. Constitution)

52. The allegations of Paragraphs 1 through 51 of this responsive pleading are re-alleged and incorporated by reference.

53. The Due Process Clause of the United States Constitution, with which Article I of the North Carolina Constitution is co-extensive, requires governmental action to be fair, in accordance with the law, and not arbitrary or capricious.

54. By attempting through this action to secure a disciplinary sanction in connection with the Defendant's professional dealings with three former clients who have not complained or otherwise suffered any harm or loss, and by doing so on the basis of intentional misrepresentations of fact, in apparent bad faith, and as part of a continuing effort to menace and intimidate the Defendant, and to exact a price for the Defendant's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff's sharp practices and incessant efforts to mount legal attacks that the Defendant's own clients have not mounted, the Plaintiff has deprived the Defendant of his right to substantive due process.

55. As a direct and proximate result of the Plaintiff's conduct in this regard, the Defendant has sustained financial, professional and emotional damage, and is entitled to have this action dismissed and to recover the costs, expenses and attorneys fees that he has incurred in defending this action.

56. Furthermore, since the instant action is part of a continuing effort to exact a price for the Defendant's having exercised his statutory and constitutional rights to defend himself zealously against, and to seek appellate review of, the Plaintiff's repeated legal assaults, since the Plaintiff secured the Grievance Committee's authorization to file this action with full knowledge that the Grievance Committee was relying on a grievance that the Plaintiff knew contained material and intentional misrepresentations of fact, and since the grievance giving rise to this action was based upon information and clients known to the Plaintiff prior to July 17, 2000 (the first day of the hearing in Gilbert I), the Defendant is also entitled to a judgment:

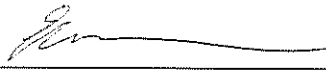
- a) Declaring the filing of this action to be the result of a deprivation of substantive due process;
- b) Declaring the filing of this action to be the result of the perpetration of a fraud upon the Grievance Committee of the North Carolina State Bar;
- c) Declaring the filing of this action to be unconstitutional, and without justification or lawful authority;
- d) Enjoining the Plaintiff from attempting to re-litigate any of the claims asserted in the Complaint in this action; and
- e) Enjoining the Plaintiff from attempting in the future to litigate any claims relating to the Defendant's relations with his clients that may have accrued on any date prior to the date that the Defendant is reinstated to the practice of law.

WHEREFORE, Defendant respectfully prays as follows:

- (1) That the Complaint in this action be dismissed with prejudice;
- (2) That Rule 11 sanctions, including, but not necessarily limited to, an award of reasonable attorneys incurred by the Defendant in responding to and addressing all of the issues raised by the Complaint and Answer in this action, be imposed against the Plaintiff in this case;
- (3) That a judgment be entered
 - a) Declaring the filing of this action to be the result of a vindictive prosecution, a deprivation of procedural due process and a deprivation of substantive due process;
 - b) Declaring the filing of this action to be the result of the perpetration of a fraud on the Grievance Committee of the North Carolina State Bar.
 - c) Declaring the filing of this action to be unconstitutional, and without justification or lawful authority; and
 - d) Enjoining the Plaintiff from attempting to re-litigate any of the claims asserted in the Complaint in this action
 - e) Enjoining the Plaintiff from attempting in the future to litigate any claims that are deemed to have accrued on any date prior to the date that the Defendant is reinstated to the practice of law.
- (4) That the Plaintiff have and recover nothing in this action;
- (5) That the costs of this action, including reasonable attorney's fees, be taxed against the Plaintiff; and
- (6) For such other and further relief as the panel may deem just and proper.

Respectfully submitted, this 18th day of November, 2003.

Michaux & Michaux, P.A.


By: 
Eric C. Michaux
State Bar No. 2988
Counsel for Defendant
Post Office Box 2152
Durham, North Carolina 27702
(919) 596-8181

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Motion to Dismiss, Motion for Sanctions, Answer to the Complaint and Counterclaims** was served upon the attorney of record for the Plaintiff in this action by ^{sent delivery} depositing a copy of the same in the United States Mail, postage prepaid and addressed to:

A. Root Edmonson, Esq.
The North Carolina State Bar
P.O. Box 25908
Raleigh, North Carolina 27611

This the 18th day of November, 2003.



Eric C. Michaux
Post Office Box 2152
Durham, North Carolina 27702